

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

PAMELA JEAN ICKES,) No. EDCV 09-1890 CW
Plaintiff,) DECISION AND ORDER
v.)
MICHAEL J. ASTRUE,)
Commissioner, Social Security)
Administration,)
Defendant.)

)

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for further proceedings, on the basis that the record has not been fully developed.

I. BACKGROUND

Plaintiff Pamela Jean Ickes was born on November 11, 1955 and was fifty-three years old at the time of her administrative hearing. [Administrative Record ("AR") 19, 90.] She has a tenth grade education

1 and no past relevant work experience. [AR 98, 94.] Plaintiff alleges
2 disability on the basis of kidney and stomach problems and dizziness.
3 [AR 94.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on October 8, 2009, and filed on
6 October 19, 2009. On April 14, 2010, Defendant filed an Answer and
7 Plaintiff's Administrative Record ("AR"). On July 16, 2010, the
8 parties filed their Joint Stipulation ("JS") identifying matters not
9 in dispute, issues in dispute, the positions of the parties, and the
10 relief sought by each party. This matter has been taken under
11 submission without oral argument.

12 **III. BACKGROUND**

13 Plaintiff applied for supplemental security income ("SSI") under
14 Title XVI of the Social Security Act on November 28, 2007, alleging
15 disability since April 1, 2003. [AR 10.] After the application was
16 denied initially and upon reconsideration, Plaintiff requested an
17 administrative hearing on February 15, 2008. [AR 38-41.] In a written
18 notice dated March 7, 2008, the Commissioner informed Plaintiff that
19 her request had been granted and that Plaintiff would receive future
20 notice setting the hearing date. [AR 50-54.] This notice informed
21 Plaintiff that she had a right to representation at the hearing, that
22 a representative "can help you get evidence, prepare for the hearing,
23 and present your case at the hearing," that "some private lawyers
24 charge a fee only if you receive benefits," and that "some
25 organizations" may provide free legal representation. [AR 50.] A list
26 of private attorneys and a list of organizations that provided free
27 legal representation in Plaintiff's area were included with the
28 notice. [AR 52.] Subsequent notices dated March 30, 2009 and April 2,

1 2009, informed Plaintiff of her right to representation [AR 55-56, 68-
2 74.] The notice from April 2, 2009, also included a separate handout
3 entitled "Your Right to Representation," explaining what a
4 representative could do and fee agreements. [AR 73-74.]

5 An administrative hearing was held on April 22, 2009. [AR 19.]
6 Plaintiff appeared without counsel. [Id.] At the start of the hearing,
7 the following dialogue took place between the ALJ and the Plaintiff
8 regarding her right to representation:

9 "ALJ: You are not represented at this time, is that correct?

10 CLMT: That's right.

11 ALJ: Okay, and do you understand that you have a right to be
12 represented?

13 CLMT: Yes, sir.

14 ALJ: Okay, and do you have any questions concerning those
15 rights?

16 CLMT: Not that I know of.

17 ALJ: All right, are you going to waive your right to be
18 represented and proceed today?

19 CLMT: Yes."

20 [AR 21.]

21 The hearing proceeded. [AR 21-35.] Testimony was taken from
22 Plaintiff, a medical expert, and Plaintiff's friend. [AR 19.] The ALJ
23 subsequently denied benefits in a decision dated July 6, 2009. [AR 10-
24 18.] When the Appeals Council denied review on August 21, 2009, the
25 ALJ's decision became the Commissioner's final decision. [AR 1-3.]

26 **IV. STANDARD OF REVIEW**

27 Under 42 U.S.C. § 405(g), a district court may review the
28 Commissioner's decision to deny benefits. The Commissioner's (or

1 ALJ's) findings and decision should be upheld if they are free of
2 legal error and supported by substantial evidence. However, if the
3 court determines that a finding is based on legal error or is not
4 supported by substantial evidence in the record, the court may reject
5 the finding and set aside the decision to deny benefits. See Aukland
6 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
7 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
8 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
9 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
10 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
11 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

12 "Substantial evidence is more than a scintilla, but less than a
13 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
14 which a reasonable person might accept as adequate to support a
15 conclusion." Id. To determine whether substantial evidence supports
16 a finding, a court must review the administrative record as a whole,
17 "weighing both the evidence that supports and the evidence that
18 detracts from the Commissioner's conclusion." Id. "If the evidence
19 can reasonably support either affirming or reversing," the reviewing
20 court "may not substitute its judgment" for that of the Commissioner.
21 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

V. DISCUSSION

A. THE FIVE-STEP EVALUATION

24 To be eligible for disability benefits a claimant must
25 demonstrate a medically determinable impairment which prevents the
26 claimant from engaging in substantial gainful activity and which is
27 expected to result in death or to last for a continuous period of at
28 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at

1 721; 42 U.S.C. § 423(d)(1)(A).

2 Disability claims are evaluated using a five-step test:

3 Step one: Is the claimant engaging in substantial
4 gainful activity? If so, the claimant is found not
disabled. If not, proceed to step two.

5 Step two: Does the claimant have a "severe" impairment?
6 If so, proceed to step three. If not, then a finding of not
disabled is appropriate.

7 Step three: Does the claimant's impairment or
8 combination of impairments meet or equal an impairment
9 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
10 so, the claimant is automatically determined disabled. If
11 not, proceed to step four.

12 Step four: Is the claimant capable of performing his
13 past work? If so, the claimant is not disabled. If not,
14 proceed to step five.

15 Step five: Does the claimant have the residual
16 functional capacity to perform any other work? If so, the
17 claimant is not disabled. If not, the claimant is disabled.

18 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
19 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
20 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
21 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
22 "not disabled" at any step, there is no need to complete further
23 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

24 Claimants have the burden of proof at steps one through four,
25 subject to the presumption that Social Security hearings are non-
26 adversarial, and to the Commissioner's affirmative duty to assist
27 claimants in fully developing the record even if they are represented
28 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")¹, age,
 2 education, and work experience, a claimant can perform other work
 3 which is available in significant numbers. Tackett, 180 F.3d at 1098,
 4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ found that Plaintiff had not engaged in substantial
 7 gainful activity since November 28, 2007 (step one); that Plaintiff
 8 had "severe" impairments, namely chronic nephrolithiasis with retained
 9 kidney functions and hypertension (step two); and that Plaintiff did
 10 not have an impairment or combination of impairments that met or
 11 equaled a "listing" (step three). [AR 12-13.] Plaintiff was found to
 12 have an RFC to perform the full range of light work. [AR 13-17.]
 13 Plaintiff had no past relevant work (step four). [AR 17.] Based on
 14 application of Rule 204.00 of the Medical-Vocational Guidelines
 15 ("Grids"), it was determined that Plaintiff could perform work
 16 existing in significant numbers in the national economy (step five).
 17 [AR 18.] Accordingly, Plaintiff was found not "disabled" as defined
 18 by the Social Security Act. [Id.]

19 **C. PLAINTIFF'S PRESENT CLAIMS**

20 The parties' Joint Stipulation identifies the following disputed
 21 issues:

- 22 1. Whether the ALJ obtained a proper and informed waiver of

23 ¹ Residual functional capacity measures what a claimant can
 24 still do despite existing "exertional" (strength-related) and
 25 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
 26 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
 27 work without directly limiting strength, and include mental, sensory,
 28 postural, manipulative, and environmental limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 Plaintiff's right to representation.

- 2 2. Whether the ALJ properly considered all of the relevant
3 medical evidence of record.
4 3. Whether the ALJ has properly considered Plaintiff's
5 subjective complaints and properly assessed Plaintiff's
6 credibility.

7 [JS 3.]

8 As discussed below, Issue One is dispositive.

9 **D. RIGHT TO REPRESENTATION**

10 A Social Security claimant has a statutory right to be
11 represented by counsel at an administrative hearing. 42 U.S.C. § 406²;
12 20 C.F.R. §§ 404.1700, 416.1500. Although the absence of counsel,
13 standing alone, does not deprive a claimant of a fair hearing, the
14 Commissioner has a duty to inform the claimant of the right to
15 counsel, so that the claimant may decide knowingly whether he or she
16 wishes to waive this right. Edwards v. Sullivan, 937 F.2d 580, 585
17 (11th Cir. 1991); Thompson v. Sullivan, 933 F.2d 581, 584 (7th Cir.
18 1991); Clark v. Schweiker, 652 F.2d 399, 403 (5th Cir. 1981). A
19 claimant must be informed not only of his or her right to counsel, but
20 of the importance of having an attorney, of the availability of free
21 legal services to represent indigent claimants, and the limits on fees
22 to private counsel to twenty-five percent of retroactive benefits.
23 Binion v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994); Smith v.

24
25 ² The statute states, in pertinent part, "The Commissioner of
26 Social Security shall notify each claimant in writing, together with
27 the notice to such claimant of an adverse determination, of the
28 options for obtaining attorneys to represent individuals in presenting
their cases before the Commissioner of Social Security. Such
notification shall also advise the claimant of the availability to
qualifying claims of legal services organizations which provide legal
services free of charge." 42 U.S.C. § 406(c).

1 Schweiker, 677 F.2d 826, 829 (11th Cir. 1982); Clark, 652 at 403; see
 2 also Blom v. Barnhart, No. 04-C-0912, 363 F. Supp. 2d 1041, 1046 (E.D.
 3 Wis. March 26, 2005)(finding uninformed waiver invalid even though
 4 claimant was an attorney).

5 If a claimant's waiver is invalid, reversal is appropriate if
 6 "the claimant can demonstrate prejudice or unfairness in the
 7 administrative proceedings." Vidal v. Harris, 637 F.2d 710, 713 (9th
 8 Cir. 1981)(quoting Hall v. Sec. of Health, Ed. and Welfare, 602 F.2d
 9 1372, 1378 (9th Cir. 1979)). Where a claimant is unrepresented by
 10 counsel, it is "incumbent upon the ALJ to conscientiously and
 11 scrupulously probe into, inquire of, and explore all the relevant
 12 facts" at the hearing so as to protect the claimant's interests. Cox
 13 v. Califano, 587 F.2d 988, 991 (9th Cir. 1978); see also Higbee v.
 14 Sullivan, 975 F.2d 558, 561 (9th Cir. 1992); Key v. Heckler, 754 F.2d
 15 1545, 1551 (9th Cir. 1985); Vidal, 637 F.2d at 713-14. When the
 16 "heavy burden imposed by Cox" is not met in this context, and the
 17 unrepresented claimant may have been prejudiced, "the interests of
 18 justice demand that the case be remanded." Vidal, 637 F.2d at 714-15.

19 Here, Plaintiff's limited education and the brevity of the
 20 advisements given to her at the hearing raise questions as to whether
 21 she responded to the ALJ's question regarding her right to counsel
 22 with full understanding. See Vidal, 637 F.2d at 714 (finding "serious
 23 question" whether claimant with limited reading skills validly waived
 24 right to counsel). Even assuming that Plaintiff knowingly waived her
 25 right to counsel, the record indicates that the Commissioner's heavy
 26 burden to develop the record, imposed by Cox, was not met. Vidal, 637
 27 F.2d at 713-14. The transcript of the administrative hearing
 28 indicates that Plaintiff was prejudiced by inadequate examination of

1 the medical expert: the testimony did not indicate whether he was
2 crediting Plaintiff's subjective complaints of pain in expressing his
3 opinion of Plaintiff's limitations or which medical condition he was
4 crediting to account for the pain. [AR 28-30.] The record also
5 indicates Plaintiff was unable to further develop the record, as she
6 responded to the ALJ's inquiry of whether she had any questions for
7 the medical expert with "not that [she knew] of." [AR 30.] The
8 questions by the ALJ at the administrative hearing also failed to
9 fully develop the Plaintiff's own testimony, such as her limitations,
10 subjective feelings of pain, and history of medical treatment. [AR 23-
11 25.] Under these circumstances, remand for further proceedings is
12 appropriate.

13 **E. REMAND FOR FURTHER PROCEEDINGS**

14 The decision whether to remand for further proceedings is within
15 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
16 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
17 further proceedings, or where the record has been fully developed, it
18 is appropriate to exercise this discretion to direct an immediate
19 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
20 remand for further proceedings turns upon their likely utility).
21 However, where there are outstanding issues that must be resolved
22 before a determination can be made, and it is not clear from the
23 record that the ALJ would be required to find the claimant disabled if
24 all the evidence were properly evaluated, remand is appropriate. Id.
25 Here, as set out above, outstanding issues remain before a finding of
26 disability can be made. Accordingly, remand is appropriate.

27

28

VI. ORDERS

Accordingly, **IT IS ORDERED** that:

1. The decision of the Commissioner is **REVERSED**.

2. This action is **REMANDED** to Defendant, pursuant to Sentence of 42 U.S.C. § 405(g), for further proceedings as discussed.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: July 29, 2010

Carla M. Woehrle
CARLA M. WOEHRLER
United States Magistrate Judge